IN THE

Supreme Court of the United States

OCTOBER TERM—1944

No.

GREATER NEW YORK BROADCASTING CORPORATION,
Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF IN SUPPORT OF PETITION

POINT I

(On Questions Presented, #1, 2, and 3)

The Board's order, insofar as it directed petitioner to reinstate the 15 men with back pay, and also to bargain with the Union, was void for want of due process, and also because the finding upon which it was based to the effect that those men were not discharged at all, was unsupported by substantial evidence as a matter of law.

A.

The record furnishes no basis whatever for the Board's finding that those 15 men were not discharged at all. That respondent did discharge them on November 3-4 was conclusively established by the pleadings and was not even an issue in the case. Only the cause of their discharge was put in issue by the pleadings and litigated at the hearing. Hence the finding that they were not discharged at all cannot be sustained.

The Board's complaint (B. Ex. 1(2), R.A. 332-341) specifically alleged that petitioner "did on or about November 3-4, 1940 *discharge* the following persons employed at its said New York office and Kearney transmitting plant" (Complt. ¶¶ 4 and 8), naming a list of employees including the 15 above mentioned, that petitioner "refuses and has continued to refuse to date to reinstate the *discharged* employees above referred to * * * since their respective dates of *discharge* to their former positions or employment" (Complt. ¶¶ 5 and 9); that the petitioner *discharged* and refused to reinstate said employees because they joined and assisted the Union and because said employees engaged in a strike and other concerted activities (Complt. ¶ 14),[1] and that petitioner did thereby discriminate in regard to the hire or tenure or conditions of employment of said employees (Complt. ¶ 22).

The petitioner's amended answer (B. Ex. 1(8), R.A. 341-350) expressly *admitted* the discharge of those 15 men (Am. Ans. ¶¶ "First" and "Fifth"); denied that their aforesaid discharge and denial of reinstatement was because they joined or assisted the Union or engaged in a strike or other concerted activities as alleged in the complaint (Am. Ans. ¶ "Eleventh"); and alleged affirmatively

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[1] The above allegations as to the discharges of those employees are in substance the same as contained in the Union's amended charge filed against respondent on January 18, 1941 (B. Ex. 1(1), R.A. 327-331), and upon which charge the complaint was issued.

that they were discharged for good and sufficient cause therein detailed and that they were subsequently refused re-employment for the same causes for which they had been discharged (Am. Ans. ¶ "Eleventh").

Thus, the discharge of those 15 men on November 3-4 was an established fact in the case, conclusively stipulated in the pleadings of both the Board and petitioner, which permitted of no controversy, required no proof and for all purposes of the proceeding was to be taken as true. *Dunham* v. *Cudlipp*, 94 N. Y. 129; *Altemus* v. *Talmadge*, 58 F. (2d) 874, 877; *Central R. R. of N. J.* v. *Stoermer*, 51 F. 518 C. C. A.); *L. P. Larsen Jr.* v. *Wm. Wrigley Jr. Co.*, 253 F. 914, 918 (C. C. A.). The only issue relating to the subject of discharges which the Board was called upon to determine under the pleadings, was whether those 15 men were discharged for Union activities, as the Board alleged, on the one hand, or for misconduct and other valid cause, as the petitioner alleged, on the other hand (R.A. 348-349).

What did the Board do with respect to that issue so clearly defined by the pleadings? In the light of the Board's own finding that petitioner had been bargaining in good faith up to the very moment of the strike on November 3, and that the strike was not the result of any unfair labor practice on the part of the petitioner, the Board could not very well find, and there is not a scintilla of evidence which would sustain a finding, that those 15 men were discharged on November 3-4 without valid cause or because of their Union activities; and yet, on the other hand, for the Board to have made an affirmative finding that those men *were* validly discharged on that date, would have destroyed the Board's entire case against respondent.[2] The Board, there-

[2] A finding to the effect that the 15 men were validly discharged would necessarily have precluded a direction in the Board's order, such as is now contained therein, requiring the respondent to reinstate those men with back-pay. It would also have precluded a direction, now therein contained, requiring respondent to recognize and bargain with the Union; for by reason of those valid discharges, the Union lost its majority status as hereinbelow demonstrated.

fore, wholly ignored that issue—the issue as to the *cause* of the discharges—and instead made a gratuitous finding, wholly outside the issues of the case and directly contrary to the fact stipulated in the pleadings, that those 15 men *were not discharged at all* on November 3-4 or at any other time; that they were merely "threatened" on that date with loss of their jobs (B.A. 118); that petitioner did not then "actually discharge" any of them but "rather used threats of loss of employee status in an attempt to break the strike * * *" (B.A. 116-117).[3]

Patently there was no warrant in the Board to make that finding, since no such issue was presented by the pleadings or litigated at the hearing, directly or indirectly. *NLRB* v. *Sands Mfg. Co.*, 306 U. S. 332; *NLRB* v. *Citizen-*

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[3] This unwarranted and erroneous finding, to the effect that the 15 men were not discharged but only threatened with discharge on November 3-4, constitutes the sole and entire foundation upon which the Board has built its whole case against petitioner, for upon that finding the Board proceeds to make and rest these further vital findings: (1) that since those 15 men were not discharged on November 3-4, they thereafter retained their status as striking "employees" (B.A. 133); (2) that as "employees," they were entitled to reinstatement to their positions without loss of seniority or other rights, when same was requested at the end of the strike on December 5, 1940 (B.A. 133); (3) that since they were not discharged on November 3-4, petitioner discriminated against them when it treated them on December 5 as applicants for new employment rather than as employees entitled to full reinstatement (B.A. 133, 120); (4) that from the fact that they were not discharged on November 3-4 but only "threatened" with discharge, it is evident that they were thereafter denied reinstatement because of petitioner's "primary determination" to make good that threat of loss of employment (R.A. 128); (5) that since they were not discharged on November 3-4, petitioner's later contention that they had been discharged was a "subterfuge to avoid bargaining with ACA" (B.A. 116-117); and (6) that since they were not discharged on November 3-4, the Union never lost its majority status, which would have resulted had they been in fact discharged (B.A. 108, Footnote; B.B. 36, Footnote; R.A. 274).

Manifestly, all of these derivative findings must fall with the collapse of the primary erroneous finding upon which alone they rest.

So, too, must fall the following arguments made in the Board's brief in the Circuit Court which stem from the same erroneous hypothesis that those men were not discharged on November 3-4:

> "In any event, even if petitioner sincerely believed that the strikers had tampered with its equipment, it at no time considered such misconduct serious enough to warrant their discharge" (B.B. 47);
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> "It is thus apparent that petitioner cannot successfully defend its refusal to reinstate the 14 strikers on the ground that, shortly after the

News Co., 134 F. (2d) 970; *Morgan* v. *U. S.*, 298 U. S. 468; *Morgan* v. *U. S.*, 304 U. S. 1, 18; *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88, 91; *U. S.* v. *Abilene & Southern Ry. Co.*, 265 U. S. 274; *Altemus* v. *Talmadge, supra; J. P. Jorgenson* v. *Rapp*, 157 F. 732, 738. The pleadings marked the boundaries within which the case was tried and the proofs adduced (*Tinsdale* v. *Pres., etc., Delaware & Hudson Co.*, 116 N. Y. 419, 420); and since the discharge of those 15 men stood admitted by the pleadings, the Board was bound thereby as conclusively as were the parties themselves. *Williams* v. *Took*, 108 Fed. (2d) 758; *Postal Telegraph* v. *Newport*, 247 U. S. 464, 473; *Dunham* v. *Cudlipp, supra; Altemus* v. *Talmadge, supra; L. P. Larsen, Jr.* v. *William Wrigley Jr., Co., supra; J. P. Jorgenson* v. *Rapp, supra.*

"The rule that judgment should be rendered in conformity with the allegations and proofs of the parties, *secundum allegata et probata* is fundamental in the administration of justice" *Wright* v. *Delafield*, 25 N. Y. 266, 268; *McNeil* v. *Cobb*, 186 A. D. (N. Y.) 177, aff'd 230 N. Y. 536; *Morgan* v. *U. S., supra; L. P. Larsen, Jr.* v. *Wm. Wrigley Jr., Co., supra;* and since the one question distinctly and explicitly put in issue by the pleadings and actually litigated was not whether those men were discharged or not, but rather whether, their discharges being admitted, they were discharged for valid cause or for Union activities, the Board's finding that those men *were not discharged*

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commencement of the strike, it terminated their employment for the perpetration of malicious mischief or other improprieties" (B.B. 42);

"The related argument that the Union lost its majority on November 3 and 4, when, petitioner claims, it discharged all strikers whom it deemed guilty of sabotage and misconduct, is considered in detail, *infra*, pages 40-42. Since, as is there pointed out, the Board properly found that none of the strikers was discharged at that time, this defense to the refusal to bargain is obviously without merit" (B.B. 36, Footnote 14).

All of the foregoing arguments of the Board, we repeat, become wholly untenable with the fall of the above erroneous factual finding from which they are drawn.

at all cannot be upheld even if there be some evidence which indirectly found its way into the record during the trial upon which that finding might be sustained. *McNeil* v. *Cobb, supra; U. S.* v. *Abilene & Southern Ry. Co., supra; J. P. Jorgenson* v. *Rapp, supra.* Such evidence must be disregarded and cannot form the basis for the Board's finding, for it bears no relation to the issue tendered by the pleadings. *McNeil* v. *Cobb, supra; Central R. R. of N. J.* v. *Stoermer, supra.* "The principle still remains that the judgment to be rendered by any court must be *secundum allegata et probata;* and this rule cannot be departed from without inextricable confusion and uncertainty and mischief in the administration of justice. Parties go to court to try the issues made by the pleadings, and courts have no right impromptu to make new issues for them, on the trial, to their surprise or prejudice, or *found judgments on grounds not put in issue, and distinctly and fairly litigated.*" *Wright* v. *Delafield,* 25 N. Y. 266, 270; *J. P. Jorgenson* v. *Rapp, supra; Morgan* v. *U. S.* (2 cases), *supra; Valley Mould & Iron Corp.* v. *NLRB,* 116 F. (2d) 760.

A different situation, perhaps, might here exist had the parties tried this case upon the merits without reference to the pleadings or to the issues framed thereby (*Dunham* v. *Cudlipp, supra*), or if petitioner by its silence or conduct had acquiesced in the trial of a new or different cause of action not alleged in the complaint (*McNeil* v. *Cobb, supra; NLRB* v. *Yale & Towne,* 114 F. (2d) 376 (C. C. A. 2)). But most certainly such was not the case. Time and again, by statements made during the trial, all parties, as well as the Trial Examiner, emphasized that the issues being tried were only those framed by the pleadings and not otherwise (R.A. 4-18; 37; 65-67; 74; 109-110; 156-159; 169; 171-5; 251; 312-313; 323-324; 861). Indeed, on the two occasions during the trial when counsel for the Board moved to conform the pleadings to the proof, petitioner opposed same

insofar as they might be intended to modify in any manner the cause of action alleged in the complaint; and in each instance, after the Board had indicated that such was not the purpose of the motion, the motion was granted only to the extent of correcting minor errors, such as incorrect dates or misspelled names (R.A. 167-8; 323-4). When the second of these motions was made at the very close of the trial, the following transpired:

> "Mr. Midonick (attorney for the Board): There are no further matters for the Board and the Board rests its case. I wish, however, to move at this time to conform the pleadings to the proof.
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> Mr. Boudin (attorney for the Union): May I join in the same motion?
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> Mr. Silverman (attorney for Petitioner): Now, Mr. Examiner, I oppose a general motion to conform the pleadings to the proof, unless the Board and the union indicate the respect in which they wish to have the pleadings so conformed. I have tried this case on the theory advanced by the Board and the union *as set forth in the complaint.* I do not wish to permit to go unopposed a motion by these parties generally made to conform the pleadings to the proof which might conceivably permit of the consideration of the merits of this case *on some theory which is not apparent from the pleadings themselves.* Now, I certainly will not oppose a motion to conform the pleadings to the proof if, for instance, it is a question of conforming a name or a date, but I do not think that there ought to be granted such a general motion, *especially in view of some of the statements that have been made by counsel for the union during the progress of this case as to what he considers is comprehended by certain allegations of the complaint, and in which I am in strong disagreement,* and I ask you to inquire of counsel what they have in mind when they make their motion asking that the pleadings be conformed to the proof.
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> Trial Examiner Bellman: What is the nature of your motion to conform?

Mr. Midonick: The nature of the motion is *not to change the theory of the case in any way,* Mr. Examiner.

Mr. Silverman: *Or the allegations of your complaint, as I understand it, in any way which relates to the merits of any of the allegations.* Am I correct about that, Mr. Midonick?

Mr. Midonick: *I think your statement is a clear statement.*

Trial Examiner Bellman: In other words, this is the usual formal motion to correct minor defects such as variations in the spelling of names, and dates.

Mr. Midonick: That is quite correct.

Trial Examiner Bellman: *As so understood,* the motion is granted.

Do you oppose that motion?

Mr. Silverman: No, I do not, sir" (R.A. 323-324). (Italics ours.)

It is clear from the foregoing that up to the very close of the hearing, the pleadings and the issues tendered thereby remained exactly the same as they were at the outset of the trial; and that the only issues litigated throughout the trial were and remained those framed by the pleadings *and no others.* Obviously, since the discharges were admitted by the pleadings, petitioner was not called upon to, and in fact did not, adduce any proof to establish the same. *Altemus* v. *Talmadge, supra; Central Railroad of New Jersey* v. *Stoermer, supra; L. P. Larson, Jr.* v. *William Wrigley, Jr. Company, supra; NLRB* v. *Citizen-News Co., supra.* Any proof on the subject which did get into the record was adduced at the hearing and received in evidence only on the specific issue as to the *cause* of the discharges (R. Ex. 8, B.A. 1317; R. Ex. 10, B.A. 1320; R. Ex. 31, R.A. 465, B.A. 405-6; 990-2; 995-6; 1000; 1004; R.A. 232-238; 242-245; 251; 257; 267-270), not on any non-existent issue as to whether or not those discharges had occurred. Manifestly, therefore, the Board's order

rests on a finding of fact, not only not in issue, but directly contrary to the fact as stipulated in the pleadings of the parties. In brief, this case (unlike the *Mackay* case where the issue resolved was fully understood and litigated by the parties—see annexed Petition, pp. 13-15, *supra*) was pleaded and tried on one theory and decided on an entirely different theory, not directly or indirectly within the purview of the pleadings, and which petitioner had no opportunity to meet. "This is not a case of mere variance or mere defect but a case of failure to prove the cause of action alleged in its entire scope. Pleadings and a distinct issue are essential in every system of jurisprudence, and there can be no orderly administration of justice without them. If a party can allege one cause of action and then recover upon another, his complaint will serve no useful purpose, but rather to ensnare and mislead his adversary." *Southwick* v. *First National Bank of Memphis,* 84 N. Y. 420, 429. It is fundamental that under such circumstances the Board's finding and order is not supported by substantial evidence and cannot stand. *NLRB* v. *Sands Mfg. Co., supra; Dunham* v. *Cudlipp, supra; McNeil* v. *Cobb, supra; NLRB* v. *Citizen-News Co., supra.*

This point was squarely raised not only by petitioner's motions to dismiss the complaint at the end of the Board's case (R.A. 174-6) and at the end of the entire case (R.A. 325-6); not only by the specific exceptions taken by respondent to the finding under discussion contained in the Trial Examiner's Intermediate Report (see Exceptions 209, 210, 217, 226, 227; R.A. 526-528) but also upon petitioner's oral argument before the Board and in its brief to the Board in opposition to the confirmation of the Intermediate Report which the Board nevertheless adopted. It was also raised, of course, before the Circuit Court of Appeals (R. 64).

Nor can the Board successfully contend that because the exacting standards of a court of law do not apply with strictness to proceedings before the Board or other administrative tribunals, this violation by the Board of the fundamental rule of due process—that final judgment or order must be *secundum allegata et probata*—does not invalidate its order. While it is true that the strict rules of pleading have no application, and that no particular form or exact accuracy of pleading is required (*NLRB* v. *Sunbeam Electric Mfg. Co.*, 133 Fed. [2d] 856; *Consumers Power Co.* v. *NLRB*, 113 Fed. [2d] 38) and while it is true that the strict rules of evidence do not apply in proceedings before the Board (§ 10b Act), nevertheless the purpose of the complaint still remains to fairly apprise the employer of the facts constituting the offense with which it is charged and of the issue which it will be required to meet (§ 10b Act; *NLRB* v. *Sunbeam Electric Mfg. Co., supra*) and the purpose of the hearing still remains to litigate those charges, and only those, which the employer has been summoned to defend (§ 10b Act), save and except where there is such an open and clearly understood purpose to try new issues that the parties are not misled or surprised to their prejudice; and then the pleadings must be amended to conform to the proof. *McNeil* v. *Cobb, supra; NLRB* v. *Citizen-News Co., supra; Ritzwoller Co.* v. *NLRB*, 114 F. (2d) 432 (C. C. A. 7, 1940); *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 340. All of this is not only implicit in any proceeding, judicial or quasi-judicial alike (*Morgan* v. *U. S.* (2 cases), *supra; Interstate Commerce Commission* v. *Louisville & Nashville RR Co., supra; U. S.* v. *Abilene & Southern Ry. Co., supra; Valley Mould & Iron Corp.* v. *NLRB, supra*), but is also expressly provided for by § 10(b) of the Act[4] and by the Board's own Rules and Regulations,[5] which neither the

[4] See Appendix, p. 43 *infra*.

[5] See Appendix, pp. 46-47 *infra*.

Board nor the Court could rightfully disregard. Indeed, the fact that § 10(b) of the Act expressly circumscribes the power of the Board to amend its own complaint, viz.: it may do so only *before* the issuance of its order, implies that if the Board decides to change the charge in its complaint or to substitute another, it must do so before the issues have been determined and while the employer still has an opportunity to defend against the new charge in the complaint as amended.

The mere fact that the Board as an administrative body, has broad sweeping powers of investigation certainly does not vest in the Board the power to deprive an employer in a proceeding before it of the fundamental and constitutional right of due process; and where as here, in a contested case tried on pleadings in which the issues were clearly defined, there has been an entire abandonment by the Board of the very substance of the main and principal charge which respondent was summoned to defend, and the substitution of another which the employer could not have anticipated and which it had no opportunity to meet, the variance is fatal as violative of due process. *Armand Co. Inc. et al.* v. *Federal Trade Commission,* 84 F. (2d) 973 (C. C. A. 2, 1936); *Valley Mould & Iron Corp.* v. *NLRB, supra; Morgan* v. *U. S.* (2 cases) *supra; NLRB* v. *Baldwin Locomotive Works,* 128 F. (2d) 39 (C. C. A. 3, 1942); *Singer Mfg. Co.* v. *NLRB,* 119 F. (2d) 131 (C. C. A. 7, 1941).[6]

[6] It is to be noted in passing this point, that the situation in the case at bar is different from that which existed in *NLRB* v. *Yale & Towne Mfg. Co.,* 114 F. (2d) 376 (C. C. A. 2, 1940). In that case the Court held that where the Board's complaint, after specific acts are charged against the employer, also charges "and by these and other acts respondent did interfere with, restrain and coerce its employees in the exercise of the rights guaranteed by Section 7 of the Act," and there is no request for a bill of particulars, no surprise and no lack of opportunity for the employer to make its defense, the Board may hear and determine another unfair labor practice of similar character although not specifically alleged. In this case there is no such allegation in the Board's complaint. On the contrary, the complaint here, after specifically alleging the discharges and other acts claimed to constitute unfair labor practices, specifically alleges that respondent "has by the *aforesaid* acts and conduct interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act" (Complt. par. 19 end, B. Ex. 1(2), R.A. 339); that "By its discharge of and refusal to reinstate employees

It follows for the reasons above stated that the Board's finding to the effect that the 15 men were not discharged at all cannot stand.[7]

B.

Since the discharge of those 15 men on November 3-4 was conclusively established by the pleadings, and since the Board made no finding that such discharges were discriminatory or otherwise violative of the Act, those men must be deemed to have been validly discharged and their employee status terminated as a matter of law.

It is fundamental that the Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1; *Associated Press* v. *NLRB*, 301 U. S. 103; that the employer may discharge or refuse to employ or re-employ for any reason, just or unjust, so long as it is not for union activities, *NLRB* v. *Tex-*

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as described above in paragraph 4 through 14 inclusive, and by all of *said* acts, and each of them, respondent did discriminate and is discriminating in regard to the hire or tenure or conditions of employment of said employees, and did *thereby* engage in and is *thereby* engaging in an unfair labor practice within the meaning of Section 8, subdivision (3) of the Act'' (Complt. par. 22, B. Ex. 1(2), R.A. 339, 340); that ''By its refusal to bargain collectively with the union * * * *as alleged above* * * * respondent did engage in and is *thereby* engaging in an unfair labor practice within the meaning of Section 8, subdivision (5) of the Act'' (Complt. par. 23, B. Ex. 1(2), R.A. 340); that ''By all the acts and conduct *alleged above* * * * and by all of *said* acts and each of them, respondent did engage in and is *thereby* engaging in an unfair labor practice within the meaning of Section 8, subdivision (1) of the Act''; (Complt. par. 24, B. Ex. 1(2), R.A. 340); and that ''The aforesaid acts of respondent *as hereinabove set forth* constitute unfair labor practices affecting commerce within the meaning of Section 8, subdivisions (1), (3) and (5), and Section 2, subdivisions (6) and (7) of the Act'' (Complt. par. 26, B. Ex. 1(2), R.A. 340).

[7] The Court below, in taking a contrary view and in sustaining the Board's order, relied on the authority of *National Labor Relations Board* v. *Mackay*, 304 U. S. 333, which it held to be here controlling on the issue of due process (R. 66-67). This was clear error. In the annexed petition, under the heading ''Reasons Relied on for the Allowance of the Writ,'' we fully discuss this phase of the decision below, and demonstrate (pp. 13-15, *supra*) that the Circuit Court of Appeals manifestly misread the teaching of the *Mackay* case and improperly extended its authority to the clearly distinguishable factual situation in this case. We therefore respectfully refer the Court to that discussion (pp. 13-15, *supra*), and do not repeat same here.

O'Kan Mills, 122 F. (2d) 433, 438 (C. C. A. 5, 1942); *NLRB* v. *Riverside Mfg. Co.*, 119 F. (2d) 302, 307 (C. C. A. 5, 1941); *Harp* v. *NLRB*, 138 F. (2d) 546 (C. C. A. 10, 1943); that the presumption is that the employer has not violated the Act; that the employer need not prove non-discrimination because of union activities, rather the Board must prove discrimination because thereof, *Interlake Iron Corp.* v. *NLRB*, 131 F. (2d) 129 (C. C. A. 7, 1942); *NLRB* v. *Union Mfg. Co.*, 124 F. (2d) 332 (C. C. A. 5, 1941).

We have already demonstrated that by the admissions in the pleadings, the discharges of the 15 men on November 3-4 were conclusively established. Inasmuch as there is no finding by the Board that such discharges were discriminatory or coercive in violation of § 8(3) or § 8(1) of the Act (the Board having erroneously found that the men were not discharged at all), the validity of the discharges is unassailable as a matter of law (same cases).

Furthermore, from the conclusive fact that the discharges were for valid cause, it follows as a legal consequence that the 15 men involved lost their status as respondent's employees upon their discharge notwithstanding the strike. *NLRB* v. *Jones & Laughlin Steel Corp., supra; Associated Press* v. *NLRB, supra; NLRB* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240. As the Supreme Court pointed out in the *Fansteel* case, the Act does not interfere with the right of the employer to discharge for any reason not specifically condemned by the Act; that where, as here, the discharge is not for the purpose of coercion or intimidation proscribed by the Act, but rests upon an "independent and adequate basis" which would have been good reason for discharge had there been no strike (and this means any reason or no reason at all, other than anti-unionism), the employee's status is thereby terminated notwithstanding the strike; and that § 2(3) of the Act which defines the term "employee" as an individual "whose work

has ceased as a consequence of or in connection with any current labor dispute" does not protect the status of an employee who is discharged for valid cause, merely because he happens to be on strike. Answering a contrary contention of the Board in that case, to the effect that § 2(3) did afford such protection, the Court said at page 255:

> "We think that the argument misconstrues the statute. We are unable to conclude that Congress intended to compel employers to retain persons in their employ regardless of their unlawful conduct,—to invest those who go on strike with an immunity from discharge for acts of trespass or violence against the employer's property, which they would not have enjoyed had they remained at work. Apart from the question of the constitutional validity of an enactment of that sort, it is enough to say that such a legislative intention should be found in some definite and unmistakable expression. We find no such expression in the cited provision."

The status of those 15 men as respondent's employees was therefore terminated upon their discharge on November 3-4.

C.

There is no basis for the Board's finding that petitioner's refusal of reinstatement to those 15 men, when requested on December 5th, constituted discrimination in violation of the Act. Basically, that finding is erroneous because it rests on the same erroneous finding that those 15 men were not previously discharged on November 3-4. Hence, the Board's order, insofar as it directs their reinstatement, is wholly unwarranted.

1. In discussing the subject of petitioner's refusal to reinstate those 15 men on December 5th, the Board starts with the premise that they were not discharged for sabotage on November 3-4 (B.A. 123), and points to its previous

finding that they were merely "threatened" on that date with loss of their jobs (B.A. 116-118). The Board then finds that petitioner refused to reinstate those men on December 5th in order to make good that threat (B.A. 128); that its reason for refusing reinstatement was "its primary determination to make good its threat to the strikers of loss of employment" (B.A. 128).

Since, as we have previously shown, those 15 men were actually discharged on November 3-4, not "threatened" with discharge, the very foundation upon which the Board rests its finding of discriminatory refusal to reinstate, collapses. For, if what the Board regarded as a mere "threat" of discharge on November 3-4, was in fact a discharge, petitioner's refusal to reinstate on December 5 could not have been for the purpose of making good the non-existent "threat" which was in truth a discharge. In brief, the Board's finding erroneously *assumes* that up to December 5th, those 15 men retained their status as striking employees, whereas, in fact, as previously shown, they had been discharged on November 3-4 and their employee status thereby terminated. Petitioner was under no obligation to reinstate those men after they had been lawfully discharged for valid cause; and the Board exceeded its powers under the Act in directing their reinstatement. *Hazel-Atlas Glass Co.* v. *NLRB*, on rehearing, 127 F. (2d) 118; *NLRB* v. *Sands Mfg. Co.*, 306 U. S. 332; *NLRB* v. *Thompson Products, Inc.*, 97 F. (2d) 13; *NLRB* v. *Remington Rand*, 94 F. (2d) 862; *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240. There is no claim or finding by the Board that petitioner discriminated against those men by failing to *hire* them as *new* applicants for jobs, because of their union activities. Hence the principle enunciated in *Phelps Dodge Corp.* v. *NLRB*, 313 U. S. 177, has no application.

D.

By reason of petitioner's valid discharge for cause of the 15 men on November 3-4 and the filling of their jobs by new non-union employees on November 3-4, the Union lost its majority status; and petitioner was therefore under no duty to then or thereafter bargain with the Union.

At the time of the strike on November 3, petitioner had in its employ a normal staff of 39 individuals within the unit which the Board has found appropriate (R. Ex. 31, R.A. 465; B.A. 24, Footnote 16; B.A. 48, Footnote 46). Of these 39, the union represented 34, they being the 34 employees who went out on strike (B. Ex. 15, B.A. 1285-6; B.A. 55). The remaining 5 neither signed authorization cards nor went on strike (B.A. 48, Footnote 46; B. Ex. 15, B.A. 1285). On November 3-4 petitioner, as previously shown, discharged for cause 15 of the 34 represented by the union, leaving only 19 union adherents. Assuming for the purpose of this discussion that those 19 *strikers* continued thereafter to retain their status as "employees" during the strike,[8] they did not constitute on November 4 or at any time thereafter, a majority of petitioner's employees. This, for the reason that petitioner had a clear right to immediately replace the 15 *discharged* employees *NLRB* v. *Sands Mfg. Co.*, 306 U. S. 332; *Matter of U. S. Stamping Co.*, 1 NLRB 123; *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240; *Hazel Atlas Glass Co.* v. *NLRB*, 127 F. (2d) 118 (C. C. A. 4, 1942); *Wilson & Co.* v. *NLRB*, 120 F. (2d)

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[8] Since, as the Board found, the strike was not caused by any unfair labor practice on the part of respondent, and since, as will be later demonstrated, the strike was not prolonged by any unfair labor practice on the part of respondent, the filling of the jobs of these strikers which occurred before they applied for reinstatement on December 5, actually did result in a loss of their employee status. *Black Diamond Steamship Corp.* v. *NLRB*, 94 F. (2d) 875 (C. C. A. 2, 1938); *Mackay Radio & Telegraph Co.* v. *NLRB*, 304 U. S. 333. Nevertheless, in here treating with the subject of the Union's lack of majority representation, we shall assume that all these 19 strikers retained their status as employees.

913 (C. C. A. 7, 1941) and actually did so on November 3-4 (R. Ex. 31(a), R.A. 466). Concededly, the 15 new employees who replaced those discharged, were not members of the union; and they together with the 5 old non-union employees who had continued working notwithstanding the strike (B.A. 48, Footnote 46) made a total of 20 non-union employees, compared to the union's 19. Thus, on November 4 the union had lost its majority status,[9] and it is uncontroverted that the union never thereafter acquired a majority.[10]

Since the union's loss of majority was the result of the valid discharges and not the result of any unfair labor practice on the part of petitioner (the Board having itself found that up to the time of the discharges the petitioner had been bargaining in good faith), and since the Act requires an employer to deal only with a bargaining rep-

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[9] The record discloses and the Board found that on November 4, the day following the start of the strike, and the first date on which respondent was found to have refused to bargain (B.A. 109, 140), respondent had already engaged, and had working, a new staff consisting of 23 persons (B.A. 55, Footnote 55; R. Ex. 31(a), R.A. 466). Only one of these 23 was represented by the Union, he being Capozucchi, a striker who returned to work on that day (B.A. 55). Thus, on that date there were 22 non-union employees working, 1 Union employee working, and 18 employees on strike. Assuming, *arguendo*, that the 19 strikers retained their status as employees and were to be considered as such on November 4, respondent's total employees on that date, both working and on strike, were 41 (*Matter of Rudolph Wurlitzer Co.*, 32 NLRB 163), of which the Union represented only 19 or less than a majority. Even if we assume that the "Sartorius doctrine" rather than the "Wurlitzer doctrine" is here applicable and that persons who replaced strikers are not to be counted in determining majority representation (see *NLRB* v. *Sartorius & Co.*, 140 F. (2d) 203, C. C. A. 2, 1944), the result would be that only 2 of the 22 non-union working employees would be eliminated as replacements of strikers, the remaining 20 being the 5 who never went on strike and the 15 who replaced the discharged employees of equal number. In that case the total number of employees working and on strike would again be 39, the number of respondent's normal staff, of which the Union represented only 19, or again less than a majority.

[10] It is undisputed that the number of employees represented by the Union was never increased after November 4, whereas respondent did increase its working staff steadily after that date (B.A. 55, Footnote 55). On November 5 there were 28 working, on November 6 there were 30, on November 7 there were 31, and on November 12 a still greater number (B.A. 55, Footnote 55). None of these, except Capozucchi, was a Union member (B.A. 55). Thus, the extent of the Union's representation never reached a majority after November 4, on which date, as above demonstrated, it likewise had no majority.

resentative designated by a *majority* of the employees within the unit (§ 9(a) Act; *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1; *Matter of U. S. Stamping Co.*, 5 NLRB 172), petitioner's refusal to bargain with the union on and after November 4 did not constitute a violation of § 8(5) as the Board erroneously held; and the Board's order insofar as it directs petitioner to bargain with the union cannot stand. *NLRB* v. *Fansteel Metallurgical Corp., supra; NLRB* v. *Sands Mfg. Co., supra; NLRB* v. *Franks Bros.*, 137 F. (2d) 989 (C. C. A. 5, 1943) aff'd 64 S. Ct. 817.

POINT II

(On Questions Presented #4 and 5)

The holding of the Circuit Court of Appeals that the 15 men were discharged and that the Board had in effect so found was palpable error because the Board had expressly refused to so find, and the Court was without power to make such a finding *de novo*.

The clear error committed by the Circuit Court of Appeals lies in the fact that, in order to sustain the Board's order, it unwarrantedly read into the Board's decision a finding of fact which the Board had expressly refused to make, and without which the order cannot stand. The Court held that petitioner's refusal to reinstate the 15 men on December 5th, 1940, constituted their "discharge"; that the Board had, in effect, so found; and that the Board's finding of such "discharges" on December 5th, 1940, fell within the reasonable limits of the allegations in the complaint to the effect that those men had been discharged "on or about" November 3 and 4, 1940 (R. 65). In brief, the Court held that the Board had proved the cause of action alleged in its complaint; that the men *had* been dis-

charged as the complaint alleged, and that the Board had so found.

What the Court wholly ignored—and clearly without warrant—is that the Board had *refused* to make any such finding and had expressly dismissed the complaint insofar as it alleged the discharge of those men. The Board's order specifically provided:

> "It is further ordered that the complaint be, and it hereby is, dismissed, insofar as it alleges that the respondent: (1) discharged any of its employees on or about November 3 and 4, 1940; * * *" (B.A. 7).[11]

Manifestly, the Court's decision cannot possibly be reconciled with the above-quoted provisions of the Board's order. Obviously, the Board could not and did not find that the men had been discharged within the allegations of the Complaint which the Board itself thus expressly dismissed. The finding that the men had been discharged was made by the Court, not by the Board; and such a finding *de novo* the Court had no power to make. Under the Act, the Court has not the same power as in reviewing a Master or a Judge, but is limited to determining whether there is substantial evidence to support the Board's finding (*National Labor Relations Board* v. *Moench Tanning Co.*, 121 F. (2d) 951.)

Since the Court could not, and the Board did not, make a finding that the 15 men were discriminatorily discharged, the Board's order cannot stand (Point I, *supra*).

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[11] In the face of the Board's above dismissal of the complaint, insofar as it alleged that any discharges had occurred, it surpasses understanding on what theory the Court could suggest, as it did in its opinion (R. 67), that petitioner should have moved to adduce additional evidence as to the *time* of the discharges—discharges which the Board expressly found had never occurred.

POINT III

(On Question Presented—#6)

It was an abuse of discretion for the Board and Circuit Court of Appeals to deny petitioner's motions for leave to adduce additional evidence as to the sabotage committed at petitioner's radio station on November 3-4, 1940, and as to the bearing of such sabotage upon petitioner's discharge of and its refusal to reinstate the 15 men.

In opposing petitioner's motion in the Circuit Court of Appeals for leave to adduce additional evidence, the Board expressly admitted that it issued its order against petitioner, "without determining whether in fact any sabotage had been committed," as the petitioner had asserted throughout the hearing (R. 62; R.A. 555). The Board contented itself with the finding that the record did not establish that the union or the strikers individually participated in or had knowledge of the commission of sabotage, if, in fact, any was committed (B.A. 128). But therein lies the very error of the Board. Naturally, because of the circumstances under which the sabotage was committed, petitioner was unable to identify the particular culprits actually responsible therefor. But it was not necessary for petitioner to *prove* that the discharged men had actually engaged in the sabotage or abetted such conduct, in order to justify its refusal to reinstate them. It was sufficient that petitioner acted in the honest *belief* that the men present at the studio and transmitter on November 3-4 had committed the sabotage, or aided, abetted, assisted or permitted others to commit such sabotage, or failed to prevent such sabotage with knowledge thereof (B.A. 992), and that it discharged and refused to reinstate them in that belief, as petitioner established (B.A. 992). (*Peninsular & Occi-*

dental S. S. Co. v. *NLRB,* 96 F. (2d) 411.) Hence, a clear-cut determination by the Board of the issue as to whether or not sabotage had been committed was manifestly imperative in this case, because it would have been determinative of the question of the bona fides of the discharge of the 15 men.

Since the Board found itself unable to resolve the question on the record evidence before it, it was an abuse of discretion to deny petitioner's application to adduce the additional cogent and potent evidence at hand on that question (R. 7-38). The Circuit Court of Appeals no less abused its discretion when it refused to grant petitioner's similar application subsequently made to the Court, notwithstanding the clear showing by petitioner of valid reasons for its failure to adduce such additional evidence during the hearings. (Sec. 10(e) Act; *Corning Glass Works* v. *NLRB,* 129 F. (2d) 967, 972.)

POINT IV

(On Question Presented—#7)

The holding of the Board that petitioner's refusal to treat with the Union during the strike and before the questions of appropriate unit and the Union's majority representation were determined by the Board constituted a violation of Section 8(5) of the Act, was clear error.

The record in this case discloses an agreement between the union and the petitioner, entered into prior to the strike, to have both the unit question and the question of the union's majority status determined by the Board. This agreement was itself the result of collective bargaining between the union and petitioner (B.A. 26) and was fol-

lowed by the actual submission of those questions to the Board by the filing of a petition under § 9 of the Act (B.A. 26). Since neither of those questions was ever determined by the Board, wholly as a result of the unilateral action of the union in "tabling" the representation proceeding coincident with the strike (B.A. 1299), petitioner was under no duty, as the Board erroneously held, to recognize the union as bargaining agent, or to bargain with the union on the basis of the unit contended for by the latter. (*Matter of Huch Leather Co.*, 11 NLRB 394; *Matter of Spicer Mfg. Co.*, 51 NLRB No. 114; *Matter of McGough Bakeries Corp.*, 58 NLRB 168; *Matter of Iowa Electric Co.*, 38 NLRB 209; *NLRB* v. *Empire Furniture Co.*, 107 F. (2d) 92 (C. C. A. 6, 1939); *NLRB* v. *Remington Rand Co.*, 94 F. (2d) 862 (C. C. A. 2, 1938); *Black Diamond Steamship Corp.* v. *NLRB*, 94 F. (2d) 875 (C. C. A. 2, 1938); *Matter of Bonafide Mills Inc.*, 38 NLRB No. 133; *NLRB* v. *Algoma Plywood and Veneer Co.*, 121 F. (2d) 602 (C. C. A. 7, 1941); *NLRB* v. *Piqua Munising Wood Products Co.*, 109 F. (2d) 552 (C. C. A. 6, 1940).)

Since the Board's order, insofar as it directs petitioner to bargain with the union, rests on the erroneous legal ground that petitioner was under a duty to bargain with the union notwithstanding the circumstances above stated, that portion of the order cannot stand.

POINT V

(On Question Presented—#8)

The Board's findings that the strike was prolonged by unfair labor practices and that petitioner discriminated against strikers who were not discharged, were not supported by substantial evidence.

As previously stated, 34 employees joined in the strike. Of these, 15 were at once discharged by petitioner by reason of the sabotage, as already shown. Of the remaining 19, 12 were subsequently reinstated by petitioner and 7 were not reinstated. It is undisputed that such latter 7 employees were not reinstated because their jobs were filled by petitioner after they went on strike and before they applied for reinstatement (R.A. 156-158); and since, as the Board found, the strike was not caused by any unfair labor practices on the part of petitioner, and since there is not a scintilla of evidence to support the Board's finding that the strike was prolonged by unfair labor practices on the part of petitioner, the direction of their reinstatement with back pay transcended the powers of the Board. (*NLRB* v. *Mackay Telegraph Co.*, 304 U. S. 333.)

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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